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No. 89-12

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

CARITA RICHARDSON, BY S. & E. RICHARDSON, GUARDIANS, et al.
Petitioners,

v.

RICHARDSON-MERRELL, INC.
Respondent.

REPLY BRIEF OF PETITIONERS

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Respondent Richardson-Merrell Inc. has raised, in its Brief in Opposition and in its Supplemental Brief,[1] questions concerning the *Erie Railroad* effect of the decision of the District of Columbia Court of Appeals in *Oxendine I*, 506 A.2d 1100 (D.C. 1986), and of the role played in this case by Rule 703 of the Federal Rules of Evidence.

The Erie Railroad Argument

In both the Brief in Opposition (pp. 6–8) and the Supplemental Brief (unpaged first page), Respondent urges that the evidence was "different" in the two cases, so that *Oxendine I* is not controlling here. That is not what this Court can accept. Yes, the Court of Appeals *did* say, in its

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[1]The Supplemental Brief supplied to this Court the August 11, 1989, decision of the District of Columbia Court of Appeals in *Oxendine v. Merrell Dow Pharmaceuticals, Inc. (Oxendine II)*, which (for the second time) reinstated a jury verdict for the plaintiff in a Bendectin-injury case.

footnote 9, that our *Erie* argument "ignores the differences in the evidence presented in the two cases." But nowhere did the Court of Appeals purport to set out, or even hint at, what those "differences" were. Indeed, the Court of Appeals contradicted itself, because earlier in that same footnote 9, the Court referred to *Oxendine I* as "a Bendectin case in which substantially similar evidence was presented."

But the best refutation of the "differences in evidence" contention comes from the judge who tried the case. The District Judge pointedly said (as we stated in our Petition, pp. 4, 6) that the *Richardson* trial was "a virtual reprise of *Oxendine*" and that he had heard "*substantially the same evidence* as the trial judge in *Oxendine*." 649 F. Supp. 799.[2] (Emphasis added)

In its Brief in Opposition, p. 6, Respondent mentions two "large and powerful epidemiological studies" admitted into evidence in the *Richardson* trial, as if they were dispositive. What Respondent fails to tell the Court is that Petitioner presented evidence from an epidemiologist who testified that it could not be concluded, from either study, that Bendectin does *not* cause limb defects, and that in fact, the studies when analyzed could support the proposition that within reasonable scientific certainty, Bendectin *did* cause birth defects. This entire matter boils

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[2]Nowhere, either at 649 F. Supp. 799, 802 (which is pointed to by Respondent) or elsewhere, does the District Judge say that the *Richardson* evidence he is discussing (the world-wide literature on Bendectin) was not before the *Oxendine I* court. What he does say, at p. 799, is that the District of Columbia Court of Appeals in *Oxendine I* rendered "an opinion which, although accurately summarizing the testimony, did not address the significance of certain evidence bearing upon the current state of scientific knowledge." That statement, which may have misled Respondent (Brief in Opposition, p. 7), is a far cry from saying that this scientific evidence was not before the *Oxendine I* court.

down to simply one more "battle of the experts"—an issue for the jury to decide. *Ferebee v. Chevron Chemical Co.*, 736 F.2d 1529, 1535 (D.C. Cir. 1984), cert. den. 469 U.S. 1062 (1984).

The Brief in Opposition is misleading in saying, p.7, that 21 published, peer reviewed epidemiological studies were "admitted into evidence" in *Richardson*, but only three of these studies were "admitted" in *Oxendine I* and thus "never became part of the record." In fact, *almost all* of these 21 studies were before the jury in *Oxendine I*. They were read to the jury and discussed by experts on the witness stand, and summaries of them were even put on the blackboard for the jury to see. Thus the *Oxendine* jury was well acquainted with these studies.

The underlying basis of the *Erie Railroad* principle—that where state law issues are involved, state law *as pronounced by state courts* is to be applied by federal courts sitting in diversity—has been of course emphasized many times by this Court, and in almost the last pronouncement of the Court last term, that doctrine was repeated. In *Browning-Ferris Industries of Vermont v. Kelco Disposal, Inc.*, ____U.S.____ 109 S.Ct. 2909 (June 26, 1989), the Court rejected a suggestion that it should "craft some common-law standard of excessiveness that relies on notions of proportionality between punitive and compensatory damages," saying that "these are matters of state, and not federal, common law. Adopting a rule along the lines petitioners suggest would require us to ignore the distinction between the state law and the federal law issues. For obvious reasons, we decline the invitation." 109 S.Ct. 2922.

And in footnote 26, the *Browning-Ferris* opinion stated that because the federal courts operate under the strictures of the Seventh Amendment, "we are reluctant to stray too far from traditional common-law standards, or to

take steps which ultimately might interfere with the proper role of the jury." But that is precisely what has happened in this case. The courts below have adopted a course of action interfering with the role of the jury, despite "the strictures of the Seventh Amendment."

The Rule 703 Argument

Respondent in its Brief in Opposition, pp. 11–14, defends the use by the Court of Appeals of Rule 703 of the Federal Rules of Evidence to preclude the testimony of the experts offered by Petitioners. But the amazing fact is that although the Court of Appeals relied on Rule 703, see decision at A-13, 14, and stated in its famous footnote 9 that "the admissibility of testimony, which is governed by the Federal Rules of Evidence, is the crux of our decision in this case," the trial judge

(1) never mentioned Rule 703, and

(2) did not hold Petitioners' evidence inadmissible.

It was the Court of Appeals that introduced both of these concepts. How could the evidence for plaintiffs be "inadmissible," as the Court of Appeals claims, when (a) our eight experts were all held by the District Judge to be properly qualified, and (b) the judge specifically ruled that their evidence was admissible, despite objections by Respondent. All that really happened was that the courts below disagreed with the jury and substituted their opinions for those of the jury.

The District of Columbia, while it has not adopted the Federal Rules of Evidence, has adopted the standard of Rule 703 for admissibility of expert testimony. See *Lampkins v. United States,* 401 A.2d 966, 970 and n.9 (D.C. 1979); *L.C.D. v. District of Columbia,* 488 A.2d 918,

921 n.8 (D.C. 1985); *Garvey v. O'Donoghue*, 530 A.2d 1141, 1144 (D.C. 1987). Thus Rule 703 governed in the *Oxendine I* decision. Moreover, Respondent specifically conceded in oral argument in *Oxendine I* that the methodology of plaintiffs' experts was not in question.

Respectfully submitted,

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